Supreme Court of the United States.

OCTOBER TERM, 1922.

NASSAU SMELTING & REFINING WORKS, LTD.,
Petitioner,
v.
BRIGHTWOOD BRONZE FOUNDRY COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

Section 57 *n* of "An act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898," and amendments thereto, provides that "claims shall not be proved against a bankrupt estate subsequent to one year after adjudication."

It is an absolute prohibition against proof and allowance of claims when so presented—

In re Knosco, 208 Fed. 201;
In re Daniel, 29 A.B.R. 284;
In re Mayer, 181 Fed. 904;
Bray v. *Cobb,* 101 Fed. 270;
In re Schaffer, 104 Fed. 982—

and, instead of being an enlargement of a creditor's rights, operates as a restriction, and does not authorize a withholding of dividends when ready, on proved

and allowed claims, nor the delay of the final settlement and closing of an estate, when ready to be closed, nor the withholding from other creditors of money due them to give a *negligent* creditor further opportunity for the proof and allowance of his claim.

In re Stein, 94 Fed. 124.

The creditor who fails to prove his claim within one year from the date of adjudication has no standing in composition proceedings.

Mr. Justice Dodge, in the respondent's district, in—

In re French, 181 Fed. 483;
In re Bickmore Shoe Co., 263 Fed. 926.

There is no contention by the petitioner that the failure to prove his claim was by reason of fraud, mistake, or accident, but the Courts have held that, even if there was this contention, or that it received no notice of the pendency of the bankruptcy proceedings, or was not scheduled as a creditor, or that it was misled by a statement in the bankrupt's schedules as to the value of a particular asset, it would not entitle it to file its proof after the year.

In re Sanderson, 120 Fed. 278.
In re Muskoka Lumber Co., 127 Fed. 886.
In re Lane, 125 Fed. 772.
In re Peck, 168 Fed. 48.
See also pages 457 and 458, Brandenburg on Bankruptcy (4th ed.), 1917.

The bankrupt may be heard to object to the allowance in composition of a claim offered for proof after

the expiration of a year, though the same has not been scheduled.

In re Lane, 125 Fed. 772.

A creditor who has not proved his claim does not acquire any rights superior to those who do; but if the claim is scheduled, it will be released by discharge, and as a penalty he loses his dividend. Such creditor has no rights in composition proceedings.

In re Mathers, 225 Fed. Cases No. 9274.

A creditor whose right to prove his claim is barred by the one-year limitation has no voice in a composition proceeding.

Collier's Bankruptcy, 1921 (12th ed.), p. 319.

In re French, 181 Fed. 583.

The petitioner's contention that section 57 *n* does not apply in composition proceedings is clearly untenable; the familiarity with the rule that, "after the confirmation of the composition and the distribution of the consideration, the case is to be dismissed"; and also, "when the order of dismissal is made, all proceedings are then at an end," makes apropos the queries: "What proceedings are at an end?" and "By what statute or statutes are the proceedings regulated until the dismissal takes place?" Clearly they are governed by all sections of the Bankruptcy Act until such dismissal takes place. If this follows, obviously section 57 *n* does apply.

Composition is a proceeding in bankruptcy.

Wilmot v. *Mudge,* 103 U.S. 317.

The petitioner offers the suggestion that "the consideration to be paid by the bankrupt to his creditors," and "creditor shall include anyone who owns a demand or claim provable in bankruptcy."

The respondent's answer to this claim is that the petitioner's claim is not one *provable* in bankruptcy.

> "If proof of claim has become barred by Section 57 n, its owner has ceased to own any demand or claim provable in bankruptcy and I am unable to see how he can maintain any right to recognition by the Court as a creditor.
>
> "So far as Re Fox 6 A.B.R. is to the contrary, the reasons against the opinion there expressed seem to me more convincing than those in its favor."
>
> From the opinion of Mr. Justice Dodge in *In re French*, 181 Fed. 483.

Section 12 *e* provides that, "Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." The petitioner does not claim that confirmation has taken place in the proceedings to date, and it is therefore reasonable to argue that, until confirmation takes place, the estate should be administered according to the Bankruptcy Act, as we know of no other federal procedure to govern the proceeding.

The petitioner urges consideration of the case of *Cumberland Glass Mfg. Co.* v. *DeWitt & Co.*, 237 U.S. 447, and attention is called to the following from the opinion, at page 454:

"True the composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire Act."

Again, the petitioner advances the case of *Greenbaum* v. *United States,* 280 Fed. 474, on his first proposition, and the language used there was as follows: ". . . the composition proceedings having the effect, when confirmed by the Court, of superseding the bankruptcy proceedings." The words "when confirmed by the Court" might well stand out in italics, for until that time we are still governed by the Bankruptcy Act, of which section 57 *n* is a part. In the case at bar confirmation of the composition has not yet taken place.

Concerning the petitioner's fifth proposition in its brief, as to the amendment in 1910, to section 12, allowing composition before adjudication, the explanation is very clear.

An adjudication of the bankrupt took place on November 19, 1920.

Section 1 of the Bankruptcy Act defines "Adjudication" as follows: "Adjudication shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt. . . ."

Therefore, if a composition is offered before adjudication, it is not within the purview of the Bankruptcy Act, for he is not yet a bankrupt, and there is no bankrupt estate. Therefore the application of section 57 *n* cannot be made. It is for this reason that Congress had to pass a special act making it possible to offer a composition before adjudication; the inevitable

conclusion being that, as soon as there is an adjudication, section 57 *n* applies the limitation.

A fair inference that may well be drawn from facts such as this case presents is that a creditor with a large claim may hold out indefinitely against the bankrupt with a view to gaining a higher percentage on his claim as an inducement to come in under the composition proceedings. He would thereby obtain a larger dividend than those creditors who were more vigilant and filed within the required time. This situation would open the door to fraud.

Conclusion.

The respondent urges that the petition be denied, as upon the face of the petition and briefs it is apparent that the decision of the lower court was correct.

BRIGHTWOOD BRONZE FOUNDRY COMPANY,
By its Attorneys,
Harry M. Ehrlich,
Henry Lasker.

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 242.

NASSAU SMELTING & REFINING WORKS, LTD.,

PETITIONER,

v.

BRIGHTWOOD BRONZE FOUNDRY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT.

This is a composition proceeding in bankruptcy, and the matter before this Honorable Court hinges upon the right of the petitioner to prove a claim and have it allowed, after a year from the date of adjudication. The offer of composition was filed a little less than three months after the adjudication; the petitioner's claim was filed for allowance about a year and five months after adjudication.

Section 57*n* of the National Bankruptcy Act of 1898 provides that "claims shall not be proved against a bankrupt estate subsequent to one year after adjudication.

Section 1 of the National Bankruptcy Act of 1898 defines "Adjudication" as follows: "'Adjudication'

shall mean the date of entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt. . . ."

As soon as there is an adjudication, section 57 of said Act then provides for the proving and allowing of claims.

Section 57*n* then applies the limitation.

Attention is called to section 12*c* of an Act to Establish a Uniform System of Bankruptcy throughout the United States, 1898, as Amended by the Acts Approved February 5, 1903, June 15, 1906, and June 25, 1910, which provides as follows:

> "Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

There is no contention made that confirmation of the composition was ever applied for in the case at bar.

It therefore follows that the words "the estate shall be administered in bankruptcy as herein provided" control the proving and allowing of claims, which is strictly limited by section 57*n*.

This is a prohibitory clause, and claims can only be filed when the bankrupt fraudulently made it appear that there are no assets in the estate. (There is no such contention of fraud in this case.)

> Collier on Bankruptcy (9th ed.), 1912, p. 747.

Section 57*n* is an absolute termination of the Court's power to allow claims that are presented after the expiration of one year.

Remington on Bankruptcy (3d ed.), 1923, vol. 2, sec. 872.
In re Shaffer, 4 A.B.R. 728; 104 Fed. 982.
In re Hawk, 8 A.B.R. 71; 114 Fed. 916.
In re Hilton, 104 Fed. 981.

To same effect in composition cases:

In re Brown, 10 A.B.R. 588; 123 Fed. 336.
In re Ingalls Brs., 13 A.B.R. 512; 137 Fed. 517.
In re Baird & Co., 18 A.B.R. 228.
In re Pettingill & Co., 14 A.B.R. 763.
In re Bickmore Shoe Co., 45 A.B.R. 24; 263 Fed. 926.
In re Co-operative Knitting Mills Co., 30 A.B.R. 181; 202 Fed. 1016.
In re Daniel, 29 A.B.R. 284; 193 Fed. 772.
In re Trion Mfg. Co., 35 A.B.R. 480; 224 Fed. 521.
In re Knosco, 31 A.B.R. 238; 208 Fed. 201.
In re Blond, 34 A.B.R. 193; 188 Fed. 452.

And, instead of being an enlargement of a creditor's rights, operates as a restriction, and does not authorize the withholding of dividends when ready, on proved and allowed claims, nor the delay of the final settlement and closing of an estate, when ready to be closed, nor the withholding from other creditors of money due

them to give a negligent creditor further opportunity for the proof and allowance of his claim.

In re Stein, 94 Fed. 124.

Composition proceedings arise from the bankruptcy proceedings, and this part of the statute is to be construed with the entire Act.

Wilmot v. *Mudge*, 103 U.S. 217.

The creditor who fails to prove his claim within one year from the date of adjudication has no standing in composition proceedings.

In re French, 25 A.B.R. 77; 181 Fed. 583.
In re Bickmore Shoe Co., 45 A.B.R. 24; 263 Fed. 926.

There is no contention in the case at bar that the creditor failed to make his claim by reason of fraud, mistake, or accident, but the Courts have held that, even if there was this contention, or the contention that he received no notice of the pendency of the bankruptcy proceedings, or was not scheduled as a creditor, or that he was misled by a statement in the bankrupt's schedules as to the value of a particular asset, it would not entitle him to file his proof after the year.

In re Sanderson, 120 Fed. 278.
In re Muskoka Lumber Co., 11 A.B.R. 761; 127 Fed. 886.
In re Lane, 125 Fed. 772.
In re Peck, 21 A.B.R. 707; 168 Fed. 48.
See also pages 457 and 458, Brandenburg on Bankruptcy (4th ed.), 1917.

In re Lane, 125 Fed. 772, discusses the right to prove after one year, and this case was cited with approval by the Supreme Court in—

> *Cumberland Glass Co.* v. *De Witt*, 237 U.S. 447, 453.

> "The entire theory of the Bankrupt Act as stated by the cases, would seem to be the settlement of the estate in bankruptcy within a reasonable time. Congress, in its wisdom, has said 'claims shall not be proved against the bankrupt estate subsequent to one year.' This provision must be strictly construed against the creditor, in order to carry out the liberal spirit shown by the other provisions of the Act, toward the debtor."

> *In re Muskoka Lumber Co.*, 11 A.B.R. 761; 127 Fed. 886.

To be entitled to a share in the distribution of the consideration a creditor must have filed and proved his claim within the time and in the manner provided for by section 57*n*, of the Bankruptcy Act.

> Brandenburg on Bankruptcy (4th ed.), 1917, p. 921, sec. 1224.
> *In re French*, 25 A.B.R. 77; 181 Fed. 583.

The bankrupt may be heard to object to the allowance in composition of a claim offered for proof after the expiration of a year, though the same has not been scheduled.

> *In re Lane*, 125 Fed. 772.

A creditor who has not proved his claim does not acquire any rights superior to those who do, but if the claim is scheduled, it will be released by the discharge, and as a penalty he loses his dividend. Such creditor has no rights in composition proceedings.

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